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Supreme Court, U.S.
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MAY 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court of the United States

October Term, 1986

JOSEPH C. GIOFFRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether defendant who has received nothing of value but acted only as a messenger or conduit may be found guilty of violating the Hobbs Act.

2. Whether the defendant police officer, who delivered money to other policemen in different geographical areas of the city and different divisions of the police department from that in which defendant was employed, acting purely as a messenger on behalf of friends, can be said to have operated "under color of official right."

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REFERENCE TO THE OPINIONS BELOW

The defendant was found guilty of one count charging a Hobbs Act Violation by jury on June 14, 1985, after which post-verdict motions were filed and denied by opinion from the bench delivered by United States District Court Judge Giles September 17, 1985, (Appendix A attached). Thereafter appeal to the Third Circuit resulted in the conviction's being affirmed by Opinion and Order dated March 31, 1986, (Appendix B attached). Third Circuit Judge Mansmann issued Order dated April 28, 1986, extending the issuance of certified judgment in lieu of formal mandate until May 30, 1986 (Appendix C attached).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner, Joseph C. Gioffre seeks Writ of Certiorari to review the judgment rendered by the United States Court of Appeals for the Third Circuit on March 31, 1986, (Appendis B attached). The judgment affirmed Petitioner's criminal conviction entered in the United States District Court for the Eastern District of Pennsylvania following a jury trial and denial of post-verdict motions (appendix A).

The Supreme Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant 28 U.S.C. §1254 (1).

PERTINENT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

This Petition arises from a criminal prosecution for violation of the Hobbs Act, 18 U.S.C. §1951.

THE STATEMENT OF THE CASE

Petitioner Joseph C. Gioffre was a distinguished police officer with a record of twenty years service in Philadelphia and many commendations prior to his indictment in February 1985 on five counts of alleged Hobbs Act Violations. The defendant's case came to trial in June 1985 and he was acquitted of all charges with the exception of count four of the indictment.

Examination of the allegations in count four and the proof presented by the government at trial demonstrates that the defendant did not commit a violation of the Hobbs Act and that an important legal and public interest would be served by the Court's reviewing the conviction to clarify the li-

mits on such federal extortion prosecutions.

The Hobbs Act appears at 18 U.S.C. §1951 and, consequently, prosecution for its violation falls within the jurisdiction of the United States District Court. Of course, that Act outlaws interference within interstate commerce by means of extortion which is defined, for purposes applicable to this case, as taking property for benefit of the defendant under color of official right.

Review of the evidence at trial shows that police officer Gioffre neither took property for himself nor acted under color of official right.

In fact at trial the testimony related to count four in the indict-

ment came from numbers banker Lester Barry who identified himself as a life long friend of the defendant, childhood playmate and acquaintance for over twenty-five years. Barry admitted to approaching the defendant on four occasions in the early 1980's attempting to induce Gioffre to assist Barry's numbers business by serving as a messenger to deliver pay-offs for police officers in parts of the City and divisions of the police department remote from that in which the defendant was employed.

After several occasions when the defendant refused Barry's blandishments, Gioffre finally agreed to deliver payoff money. Significantly the defendant received nothing for himself. He never

delivered money or did anything else for Barry within the area of the division in which defendant was employed by the police department. He never took any action or refrained from taking any action related to his own police duties as a result of requests by Barry. He served only as a messenger and his only motivation was the repeated appeals to friendship which the so-called "victim" made to him in the early 1980's before he finally succumbed.

The petitioner contended at trial and post-verdict motions that he had not received value nor acted under official color to satisfy the extortion requirement of the Hobbs Act. Basically, Judge Giles in his bench opinion denying

the motions (Appendix A) concluded that the petitioner knew that the money which he delivered would affect other policemen and consequently was culpable because of his official responsibilities as a police officer. The defense respectfully contends that such an evaluation really avoids the question of whether this particular official acted in relation to his duties as an officer or whether his personal misconduct, unrelated to the job, can be the basis of a Hobbs Act prosecution merely because he served in an official capacity.

The Circuit Court of Appeals (Appendix B) affirmed the conviction. Now the petitioner asks this court to review and vacate

his conviction. He submits that the conviction and later affirmance mistakenly applies the Hobbs Act to one not guilty of using his official title or position and not guilty of accepting illicit gain for himself directly or indirectly.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE HOBBS ACT VIOLATION REQUIRES RECEIPT OF VALUE BY THE DEFENDANT AT LEAST INDIRECTLY.

The prosecution offered no testimony at trial to show that defendant Gioffre kept any of the money he was delivering for himself or that any of the proceeds were earmarked for him. On the contrary, the trial court concluded when refusing his post-verdict motions that his motivation was solely friendship.

The United States Supreme Court in United States v. Green, 350 U.S. 415 (1956) concluded that direct receipt of money or value was not necessary to constitute extortion. The Third Circuit Appeals Court reviewed the question

in even more detail in the case of United States v. Provenzano, 334 F.2d 678 (1964) when the defendant argued that none of the monies in issue ever went directly into his pocket. In that case the opinion by Chief Judge Biggs stated at page 685 that direct or indirect receipt of the money was not necessary as long as "payments were made at the extortioner's direction to a person named by him."

Similarly in the case relied upon by the Third Circuit to affirm Gioffre's conviction, United States v. Cerilli, 603 F.2d 415 (3d. Cir., 1979), the defendant, though not directly receiving the money, arranged for his designee to take it. In the instant case,

however, the prosecution really extends the scope of the extortion definition to a messenger. The extension, however motivated by honest zeal to remove all police corruption violates the terms of the Act.

II. PROSECUTION'S FAILURE TO PROVE REQUIRED ACT UNDER OFFICIAL COLOR.

The conviction of Gioffre violates the logic of many previous cases holding that extortion only occurs when the defendant makes wrongful use of his office to receive money. See for example, United States v. Margiotta, 688 F.2d 108 (2d. Cir., 1982), United States v. Mazzei, 521 F.2d, 639 (3d. Cir., 1974), United States v. Trotta, 525 F.2d 1096 (2d. Cir., 1975), cert. denied, 425 U.S. 971

(1976).

In this case, excerpts from cross-examination of the payor of monies which Gioffre delivered clarify that the defendant never used his office to protect the numbers banker or even to facilitate corrupt agreement between the banker and police recipients of the payments:

> Q. You were aware he [Gioffre] had no control personally as a police officer over your numbers operation, isn't that correct?
>
> A. Yes, sir....
>
> Q. Now, you have testified that you went to Mr. Gioffre, sought him out, correct?
>
> A. Yes, sir....
>
> Q. And you tried to corrupt him, didn't you?
>
> A. Well, if asking him to do me a favor is trying to corrupt him, I guess I was trying to corrupt him, yeah....

Q. Well, I believe you testified it took you four times to finally convince him to deliver the envelope to you?

A. I am saying at least on two occasions.

Q. Now, he could't help you himself with regard to protection, isn't that correct?

A. No, he couldn't.

Q. And you didn't give him the money so that he himself would use his badge to protect you, isn't that correct?

A. That is correct sir.

The Second Circuit Court of Appeals addressed just such a situation in United States v. O'Grady, 742 F.2d 682 (1984) where the en banc opinion declared at page 687:

> the conduct proscribed by the Hobbs Act is the wrongful use of public office, not merely the acceptance of benefits. Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public

> official did something, under color of his public office, to cause the giving of benefits. [emphasis added]

In this case, although other police officers may very well have acted officially to induce the "victim" to make payments, no prosecution evidence proves that Gioffre did.

III. CONCLUSION

Although policemen Gioffre's agreement to deliver money for the numbers banker was probably the most tragic mistake of his personal and professional career, he neither accepted benefit for himself nor acted in his capacity as an official and so is not guilty of the Hobbs Act violation and this Court's protection for him is properly sought in the interest

of justice.

Respectfully submitted,

BY: _____

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Appendix A
EXCERPT FROM THE TESTIMONY OF SEPTEMBER 17, 1985 -- DENIAL OF POST-TRIAL MOTIONS BY JUDGE GILES

THE COURT: I have considered the briefs, the record and the defendant's reply to the government's response to the motion for a new trial and/or judgment of acquittal. The motion of defendant is denied.

Mr. Gioffre acted out of friendship, knowing that Mr. Barry relied upon his badge to pass money through to others in the police department.

In the light most favorable to the government, the evidence indicated that Mr. Gioffre knew and appreciated what he was doing with the money, what the money was for, although he may not have actually seen how much was in any

delivery. He knew the business in which Mr. Barry was engaged, indeed, Mr. Barry testified that he had given money directly to Mr. Gioffre in his location, for protection of his numbers business.

Mr. Gioffre permitted his badge to be used and for an illegal purpose, therefore, he acted under color of right in accepting the money from Mr. Barry.

At another level, the evidence is that he was induced by friendship, induced being a word to convey an indirect causation, to do what he did, however reluctantly.

With respect to the interstate commerce aspect to the argument of the defendant, that is dispelled by virtue of the stipulations pertaining to Lester Barry's

business, equipment having been purchased through Interstate Commerce.

With respect to the testimony that Mr. Barry may have at some other trial also referred to Mr. Gioffre by a code name of Mr. Gray, I find that it is not the type of evidence that would have used or could have been used to impeach the testimony of Mr. Barry because it does not exclude Mr. Barry's testimony in other cases that he also referred to Mr. Gioffre as Joe DiMaggio.

With respect to the testimony proffered or the position taken on the rule 35 motion, by an officer Kelly, the he received money from Mr. Barry to pass on to certain police officers, in the police department, for the protection

of Mr. Barry's numbers and poker came operations, I find that is not the kind of evidence that would merit a new trial in the interest of justice. The evidence in this case, was that Mr. Barry paid a number of people at different times. Mr. Kelly may have been one of the people paid at one time, not to the exclusion of a time that money was paid to Mr. Gioffre under the code name of Joe DiMaggio or under the code name of Mr. Gray.

So, there is no testimony proffered here that Mr. Kelly was known by the code name of Joe DiMaggio, rather the evidence is uncontradicted, except through Mr. Gioffre, that Mr. Gioffre was known by the code name Joe DiMaggio. The jury deliberated on this matter,

considered Mr. Gioffre's testimony, in conjunction with that proffered by Mr. Barry and concluded beyond a reasonable doubt that Mr. Barry was to be credited.

For these reasons, the defendant's motion is denied.

A sentensing date has been set.

We'll move that to 9 o'clock.

Appendix B
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1584

UNITED STATES OF AMERICA

vs.

JOSEPH C. GIOFFRE,
Appellant

Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. CR. NO. 85-00052-01)
District Judge: Hon. James T. Giles

Submitted Pursuant to Third Circuit
Rule 12(6) March 19, 1986

Before: HUNTER and MANSMANN,
Circuit Judges and McCUNE,
District Judge*

(Filed March 31, 1986)

MEMORANDUM OPINION

MANSMANN, Circuit Judge.

In this criminal appeal from a judgment of conviction and sentence,

defendant Gioffre alleges several trial errors, questions the sufficiency of the evidence with regard to his conviction of extortion under the Hobbs Act, and challenges the constitutionality of the Hobbs Act. Finding no merit in any of the issues raised, we will affirm.

I.

The circumstances of this case evolve from the allegedly criminal actions of Gioffre while he served in his official capacity as a Philadelphia police officer.

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* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

Defendant was indicted in four separate counts: specifically, defendant was charged with Conspiracy to Violate the Hobbs Act (18 U.S.C. §1951) (Count I) and was also charged with three substantive counts of Hobbs Act Extortion (18 U.S.C. §1951) (Counts II, IV and V).

On June 21, 1985, the district court granted defendant's Motion for Judgment of Acquittal on Count II. Following a jury trial, defendant was acquitted on Counts I and V of the indictment and was found guilty on Count IV of the indictment. Defendant's post-trial motions were denied, and he was sentenced to two years of imprisonment on Count IV and to pay a fine of five thousand dollars.

II.

Gioffre first asserts that the evidence on the Hobbs Act conviction is insufficient as a matter of law. To the extent that Gioffre challenges the legal determinations of the district court our scope of review is plenary. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F. 2d 98, 101-02 (3d Cir. 1981). In the alternative, Gioffre argues that there was insufficient evidence submitted at trial on the Hobbs Act extortion charge to compel a finding of guilt beyond a reasonable doubt. When deciding such a sufficiency claim, we must determine whether there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's verdict.

United States v. Adams, 759 F. 2d 1099, 1113 (3d Cir.), cert. denied, 106 S.Ct. 336 (1986).

Gioffre's sufficiency claim is focused only upon the extortion elements required for a Hobbs Act conviction: specifically Gioffre contends that the government failed to prove 1) that Gioffre had obtained any property from the victim and 2) that Gioffre was acting under color of official right with respect to the relevant acts. To this end, it is Gioffre's contention that there was no showing that he received any benefits from the payments Lester Barry made to him other than Mr. Barry's friendship, which he further contends does not constitute property within the meaning of the act. Also

Gioffre maintains that he did not exercise the powers of his public office, and there was no showing made that Gioffre was aware that Mr. Barry was making payments to him because of his official position as a Philadelphia police officer.

There are two essential elements of a Hobbs Act crime: namely, interference with commerce and extortion. Stirone v. United States, 361 U.S. 212, 218 (1960). The term "extortion" is defined by the act as follows:

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The extortion element was proven in this case.

According to case precedent, in a Hobbs Act prosecution for extortion under color of official right, "'[t]he Government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position'" United States v. Jannotti, 673 F.2d 578, 595 (3d Cir.), cert. denied, 457 U.S. 1106 (1982), quoting United States v. Hedman, 630 F.2d 1184, 1195 (7th Cir.), cert. denied, 450 U.S. 965 (1981). Furthermore, the Hobbs Act covers the acceptance of bribes by public officials when payment was not obtained by force, threats, or use of fear, and there need not be evidence or inducement or prior request for such payments.

Jannotti, supra, at 595. It is also well established that a person may violate the Hobbs Act without himself receiving the benefit of his extortion. United States v. Cerilli, 603 F.2d 415, 420 (3d Cir.), cert. denied, 444 U.S. 1043 (1979).

Finally, viewing the evidence, as we must in light most favorable to the government as verdict winner, it is clear that Gioffre's conviction for extortion under the Hobbs Act must stand. Lester Barry, an illegal numbers banker,[1] testified that he paid the police money for protection from arrest in order

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1. According to Barry's testimony, a numbers banker is a type of administrator responsible for a number of people who turn in numbers that they wrote. The banker pays the commission to the writers on the amount they wrote, pay the winners and does anything else required in connection with the business.

that he would be able to continue to run his illegal numbers operations and poker machines. In particular, he testified that he paid money once a month to police officer Gioffre to pass on to others. Barry identified Gioffre from the witness stand, revealed that Gioffre's code name for the pickup of protection money was "Joe DiMaggio," and also indicated that he specifically told Gioffre that the purpose for the payment was for protection from arrest. The records which were seized show numerous payments from Barry to "Joe DiMaggio" from 1979 to 1981. Moreover, these records also contain Gioffre's unlisted home phone number next to the code name "Joe DiMaggio."

The evidence established that

Gioffre, a police officer, obtained money to which he was not entitled only because of his official position. That he might not have benefited from the money he collected from Barry is of no consequence. Given this, Gioffre's sufficiency claim fails.

III.

Gioffre argues that the Hobbs Act, as applied in his case, is unconstitutionally vague. Gioffre maintains that the statute and case law do not alert a reasonably intelligent person to the fact that when a police officer receives money from an extorted victim and passes that money on to other police officers, it is the type of conduct which is prohibited under the Hobbs Act.

It is well-established principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vagueness is not, however, a problem in this case. The term "extortion" is clearly defined in the act as "the obtaining of property from another . . . under color of official right." 18 U.S.C. 1951 (b) (2). It has been noted that the phrase "under color of official right" is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color by his office, with no proof of threat, force or duress required." United States v. Williams, 621

F.2d 123, 124 (5th Cir.), cert. denied, 40 U.S. 919 (1981). See also United States v. Mazzei, 390 F.Supp. 1098 (W.D.Pa.), modified on other grounds, 521 F.2d 639 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975) (phrase "under color of official right" is sufficient to give a person of ordinary intelligence fair notice of what is prescribed by the statute.)

The coercive element is supplied by the existence of the public office itself. United States v. Mazzei, 521 F.2d 639, 644-45 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975). Given the definitional explanation within the Act itself of extortion and the long-standing meaning of the phrase "under color of official right," Gioffre's argument that

he, a public official, had no notice of a possible Hobbs Act prosecution for his conduct of accepting monthly cash payments from an illegal numbers banker for protection from arrest, is patently without merit.

IV.

Defendant argues that there was a variance between the allegations contained in the indictment and the proof presented at trial which resulted in his being prejudiced. To this end, defendant points out that the indictment charged that he obtained money from Lester Barry under color of official right while the proof offered at trial was that Gioffre acted merely as a courier for Barry out of his friendship for Barry.

Variance between allegations of the indictment and proof presented at trial may be fatal if it destroys the basic right to be tried only on the charges presented in the indictment. United States v. Schoenhut, 576 F.2d 1010, 1021 (3rd Cir.) cert. denied, 439 U.S. 964 (1978). We have held that a judgment of acquittal is warranted where the variance is a "modification in the elements of the crime charged." Id. at 1021, quoting United States v. Somers, 496 F.2d 723, 744 (3d Cir.), cert. denied, 419 U.S. 832 (1974). If, however, the variance

does not alter the elements of the offense charged, we are to focus upon whether or not the defendant has experienced prejudice; that is, whether defendant's substantial rights have been affected by the variance. Schoenhut, supra, at 1021. Here there is not an alteration of the elements of the offense charged, and defendant does not raise such an allegation. Rather, defendant claims that he was prejudiced in his defense by the variance. In this later regard, we have held that a variance works no prejudice upon a defendant's substantial rights 1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or sur-

prised at trial and 2) if the variance is not the type which would place the defendant in danger of being prosecuted a second time for the same offense. Id. at 1021-22.

We need not, however, apply this test to determine if defendant was prejudiced since there is no variance to be tested. The indictment in this case charged extortion under color of official right and that is precisely what was proven at trial. That Gioffre may have acted out of friendship to Barry and that Gioffre received no direct benefit from the extortion does not flaw the case or create a variance. The government in keeping with the allegations in the indictment proved that Gioffre accepted

money to which he was not entitled from Lester Barry under color of official right. Specifically, the government offered evidence showing 1) that Lester Barry had to pay the police to keep his gambling operations running; 2) that Gioffre was a police officer; and 3) that Barry paid Gioffre money to pass on to the other police officers who were involved in the illegal activities. Gioffre thus received the payments under color of official right. Moreover, as has been previously established, a person may violate the Hobbs Act without himself receiving the benefit of his extortion. Cerilli, supra, at 420. Accordingly, defendant's argument fails.

V.

Gioffre argues that the district court abused its discertion in denying his motion for new trial. Because a transcript of another trial in which Lester Barry testified was only available after Gioffre's trial and because the transcript may have been used to impeach Barry, Gioffre maintains that his motion should have been granted. In essence, Gioffre argues that the availability of new evidence in his case merited a new trial. Specifically, the new evidence was the use of the code name "Mr. Gray" to refer to Gioffre.

Generally, there are five requirements which must be met before the district court will order a new trial on the basis

of newly discovered evidence: 1) facts must be alleged from which the court may infer diligence on he part of the movant; 2) the evidence relied on must not be merely cumulative or impeaching; 3) it must be material to the issues involved; and 4) it must be of such a nature that on a new trial the newly discovered evidence would probably produce an acquittal. United States v. Herman, 614 F.2d 369, 371 (3d Cir. 1980). Gioffre has not met these requirements. In fact, he indicates that the new evidence would be important only for impeachment purposes, and this alone does not warrant a new trial.

Moreover, the district court in denying the motion pointed out

the following cogent factor with which we agree:

> With respect to the testimony that Mr. Barry may have at some other trial also referred to Mr. Goiffre by a code name of Mr. Gray, I find that is not the type of evidence that would have used or could have been used to impeach the testimony of Mr. Barry because it does not exclude Mr. Barry's testimony in other cases that he also referred to Mr. Gioffre as Joe DiMaggio.

The district court cannot be found to have abused its discretion in denying defendant's motion for new trial.

VI.

Finally, as we understand Gioffre's last argument, he faults the district court for its jury instruction as it related to Count IV Hobbs Act Extortion involving Lester Barry, the count upon which

defendant was convicted. In particular, defendant argues 1) that the instruction should have indicated how defendant's official office factored into the extortion and 2) that the instruction should have made it clear that defendant must have obtained the property of another.

Whenever ar appellate court reviews the jury instructions of the trial court, it must review the instructions as a whole in order to perserve their context. Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); United States v. Palermi, 630 F.2d 192, 210 (3d Cir.), cert. denied, 450 U.S. 967 (1981). We review defendant's allegations in light of this requirement.

In pertinent part the district court offered the following charge on extortion under the Hobbs Act:

> Extortion is defined in title eighteen, section 1951, is committed when a person obtains money from any other, with his consent, under color of official right.
>
> Extortion, under color of official right, is the wrongful taking by a public official of money not due him, or his office, whether or not the taking was accomplished by force, threats, of violence.
>
> In other words, force, threats or violence does not have to be used. Extortion can be under color of official right, that is a person uses his or her public position, as an official, to cause the taking or payment of money.
>
> Here the Government has charged Mr. Gioffre with conspiring to obtain money from individuals, clubs, and businesses operating within the city of philadelphia involved in various activities, including the operations of private clubs, sale of liquor, serving of liquor after the hours allowed

by law and prostitution.

> In proving the existence of extortion, under color have official right, it is not necessary to prove that any coercion, duress or fear induced those businesses or persons to part with their money or property. It is sufficient that the public official knowingly used his office to acquire money not due him for performance of his official duties.
>
> * * * *
>
> It is not necessary for the prosecution to prove that the defendant himself directly or indirectly received the fruits of extortion, or any benefit there from.
>
> The Government must prove beyond a reasonable doubt that the defendant obtained property from another, with that person's consent, induced under color of official right.

We find that this charge in its totality clearly sets forth all of the elements of extortion under the Hobbs Act. In addition, we find that, contrary to de-

fendant's allegation, the charge did instruct the jury that in order to convict defendant, they had to find that he wrongfully used his office to obtain money from Lester Barry.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Carl Los Mansmann
Circuit Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1584

United States of America

vs.

Gioffre, Joseph C., Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it it O R D E R E D that issuance of the certified judgment in liew of formal mandate in the above cause be, and it is hereby stayed until May 30, 1986.

/s/ Carol Los Mansmann
Circuit Judge

Dated: April 28, 1986